IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 28TH NOVEMBER 2006 / 7TH AGRAHAYANA 1928

CRL.A.No. 1895 of 2005(A)

SC.349/2003 OF 2003 ON THE FILE OF THE COURT OF THE ADDL. SESSIONS JUDGE FAST TRACK COURT NO.1 (ADHOC) MANJERI.
CP.34/2003 of JUDL.MAGISTRATE OF FIRST CLASS COURT, TIRUR

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APPELLANT:

PARANGODAN ALIAS KUNHIMON,
S/O.VELAYUDHAN, THATTARAMBATH (HOUSE),
PACHATTIRI AMSOM, PERIYAPURAM.

BY ADV. ADV.R.O.MUHAMMAD SHAMEEM

RESPONDENT:

THE STATE OF KERALA, REPRESENTED BY
SUB INSPECTOR OF POLICE, TIRUR CRIME
NUMBER 653/2001 OF TIRUR POLICE
STATION.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 1895 of 2005

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Dated this the 28th day of November, 2006

JUDMENT

The appellant, accused in S.C. No.349/2003 on the file of the Court of the additional Sessions Judge, Fast Track Court No.1 (Adhoc) Manjeri, faced trial for the offences punishable under section 55(a) and (g) of the Abkari Act. The prosecution case against the appellant is as follows:- On 5-11-2004 while PW5 and police party on patrol duty, they got information that the appellant was conducting sale of arrack. On getting the information, they went to Pariyapuram Kadavu and when they reached the place called Murikkalapattu, they found the appellant was pouring a liquid from a blue cannas to a small black cannas. On seeing the police party, the appellant tried to escape from the scene of occurrence. The police restrained him and after examination, the appellant was found in possession of 35 cannas, each containing 20 litres of wash, and 1 cannas containing 18 litres of arrack. The articles were seized after preparing Ext.P1 seizure mahazar in the presence of independent witnesses, including PW1 and PW2. The appellant was arrested and the appellant along with the contraband article was taken to the police station. Thereafter, a crime has been registered against him. To prove the charge against the appellant, the prosecution

examined PW1 to PW6 and Exts.P1 to P7 were marked. Material objects MO1 to MO3 were also marked. After closing the evidence, the appellant was questioned under section 313 of Cr.P.C. He denied the commission of offence alleged against him and stated that he was innocent and the case was foisted against him.

2. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found the appellant guilty under section 55 (a) and (g) of the the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.1,00,000/- for offences under sections 55(a) of the Abkari Act and in default to undergo rigorous imprisonment for one year. No separate sentence under section 55(g) of the Abkari Act was awarded. The benefit under section 428 Cr.P.C. was granted. The above conviction and sentence passed against the appellant are assailed in this appeal.

3. As the appellant has not defended his case by his own counsel, State Brief was appointed to defend the case of the appellant. This Court heard learned counsel for the appellant as well as the learned Public Prosecutor.

4. The learned counsel for the appellant mainly urged three grounds. Firstly, the learned counsel contends that the conviction and sentence ordered against the appellant under section 55(a) of the the Abkari

Act are not sustainable in the light of decisions reported in Purushan V. State of Kerala, 2002(2) KLT 661, Surendran V. Excise Inspector (2004(1) KLT 404 and Sudhepan @ Aniyan V. State of Kerala (2005(2) KLD (Cri) 631). Secondly, the learned counsel contents that the procedures contemplated under section 36 of the Abkari Act and the Kerala Excise Manual have not been complied with by PW4 to PW6 while the detection of the offence, seizure of the contraband articles, taking the sample and sending the material objects before the court. Thirdly, it is contended that the sentence awarded against the appellant is excessive.

5. To prove the case against the appellant, the prosecution mainly relies on the evidence of PW4 to PW6. PW5 the Sub Inspector of Police who detected the crime stated that while himself and police party were on patrol duty, he received information that the appellant was dealing with arrack at a place called Murikkalapattu and when they reached that place, they found that the appellant was pouring a liquid from a blue cannas to a small black cannas and on questioning him, it is revealed that the appellant was in possession 35 cannas each containing 20 litrs of wash and 1 cannas containing 18 litres of arrack. He also stated that he prepared Ext.P1 seizure mahazar in the presence of independent witnesses, including PW1 and PW2 and samples were taken for chemical analysis. He further stated that he

arrested the appellant and crime was registered against the appellant. PW4 is the Police Constable who accompanied PW5 at the time of detection of the crime. He also supports the case of PW5. PW6, who also accompanied PW5 at the time of detection of the crime, had given evidence in terms of the evidence of PW5. Though PW1 and PW2 were turned hostile, they admitted their signatures in the seizure mahazar. The trial court accepted the evidence adduced by the prosecution and found that the prosecution had established the alleged guilt of the appellant beyond all reasonable doubt. On re-appreciation of the entire evidence, this Court is of the view that the trial court has rightly accepted the evidence of PW4 to PW6 and found that the appellant was guilty under the charge.

6. The question to be decided, in the light of the contention of the learned counsel for the appellant, is that whether the conviction and sentence ordered against the appellant are sustainable or not?

7. In Purushan's case (Supra) this Court has categorically held as follows:-

> "The word "possesses" appearing in S.55(a) comes in the context of the proceeding words "imports, exports and transports". What is contemplated there is possession in the course of the said activities. The heading given to the section itself reads as `for illegal import, etc.'. The higher punishment contemplated in S.55(a) obviously is taking into account the fact that possession of liquor intended there is in

> the course of the activities mentioned earlier viz., imports, exports and transports. On the other hand, in S. 58, the possession contemplated is at the stage after import, export, transport etc. which had already taken place some time back at the hands of somebody else. What is the distinguishing factor is that for the offence under S.58, the person in possession has knowledge of the fact that the liquor was unlawfully imported, transported or manufactured or is knowing that the duty, tax or rental payable under the Act had not been paid. The possessor therein is not directly involved in the process of import, export or transport and all that he knows at the time of holding possession of the liquor is the fact that the liquor had not come through genuine source, but it had already been unlawfully imported, manufactured or transported. It is such possession that is make liable to a lesser punishment under S.58."

As per the above decision, a Division Bench of this Court in Surendran's case (Supra) held that to attract an offence under section 55(a), it should be proved that a person was found in possession of liquor in the course of import, export, transport or transmit of the goods and in case the possession was merely with the knowledge of goods having been illegally imported or manufactured, the case would fall within the mischief of S.58. The above proposition was further considered by this Court in Sudhepan's case (Supra) and this Court had taken the view that the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor. In the light of the above principles, the conviction and sentence ordered against the appellant under

section 55(a) of the the Abkari Act are not sustainable. Hence, the conviction and sentence ordered against the appellant under section 55(a) are set aside and the appellant is acquitted of the said offence. With regard to the finding of the trial court that the appellant committed an offence punishable under section 55(g) of the Abkari Act, this Court is of the view that it requires no interference by this Court.

8. Though the trial court found that the appellant guilty under section 55(g) of the the Abkari Act, no sentence is awarded under the above section. Hence, the trial court has committed a serious mistake in not awarding any sentence under section 55(g) of the the Abkari Act. In the above circumstances, he should have been awarded a sentence as per law. No conviction shall be left without a sentence.

9. The next question to be considered is with regard to the contention that the procedures under the provisions of the Abkari Act and the Kerala Excise Manual have not been complied with by the official witnesses. In the facts and circumstances of the the case, this Court finds that the only allegation is that though the crime was detected on 5-11-200, the articles were produced before the court on 9-11-2001. The delay in producing the articles will not vitiate the trial, unless it is proved that the delay in producing the contraband article or the sample before the court would cause

substantial prejudice to the accused. There is no case that the delay would cause any prejudice to the appellant. Hence, this Court is of the view that the above contention is not sustainable.

10. Though the prosecution succeeded in proving that the sample was sent for chemical analysis, no report is seen marked by the court below. However, from the case records it is seen that the report is received from the Chemical Analyst dated 29-11-2001 in which it is stated that items 1 and 2 contained 54.31 percentage of ethyl alcohol and items 3 and 6 contained 8.58 and 10.67 percentage of ethyl alcohol respectively in the samples.

11. In the above circumstances, on accepting the evidence of the prosecution, this Court has already found that the appellant committed an offence under section 55(g) of the the Abkari Act and hence this Court is of the view that sentence of one year rigorous imprisonment and fine of Rs.1,00,000/- with default sentence of three months simple imprisonment will meet the ends of justice. Ordered accordingly.

The appeal is partly allowed.

K. Thankappan,
Judge.

K. Thankappan,J.

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Judgment

28-11-2006